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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 140.

THE CREEK NATION, PETITIONER,

VS.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF.

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OPINION BELOW.

The opinion of the Court of Claims upon the order of remand by the Supreme Court is not yet reported (Rec. 27).

JURISDICTION.

The original judgment of the Court of Claims was entered on March 13, 1933 (77 Ct. Cls. 159) (Rec. 6-25). This decision was reversed by this court on April

29, 1935 (295 U. S. 103). The judgment of the Court of Claims upon the mandate of this court was entered on November 9, 1936 (Rec. 27-31). Motion for a new trial filed in the proceedings upon said mandate was overruled on May 3, 1937 (Rec. 32).

The jurisdiction of this court is invoked under Section 3 (b) of the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 939 (U. S. C., Title 28, Sec. 288).

QUESTION PRESENTED.

The sole question presented is as follows:

> Whether the Court of Claims, in fixing the date of the approval of the Act of February 13, 1891, Ch. 165, 26 Stat. 749, as the date of appropriation of the Creek lands in question, and assessing the value of same as of that date, followed the directions laid down by this court in its decision of April 29, 1935, 295 U. S. 103.

STATEMENT.

The material facts have been summarized by this court in its opinion of April 29, 1935, as follows (295 U. S. 103, 105-108):

> "Under a treaty of 1833 the United States granted to the Creek Tribe, by a patent conveying a fee simple, a large tract of land in Indian Territory, now Oklahoma. By a treaty of 1866 the Creeks ceded to the United States the westerly half of that tract, but expressly retained the easterly half; and the United States stipulated it would cause a north and south line separating the ceded from the unceded lands to be surveyed under the direction of

the Commissioner of Indian Affairs, and guaranteed to the Creeks quiet possession of their unceded lands.

"In 1871 one Bardwell, acting under the direction of the Commissioner of Indian Affairs, surveyed the divisional line. A controversy soon arose as to whether the line was surveyed too far to the east, and thereby encroached on unceded lands of the Creeks; but that controversy, if not terminated before, was put to rest and the line effectively recognized by an agreement made between the Creek Tribe and the United States in 1889, wherein the Tribe's ownership of the lands east of that line was expressly recognized.

"In 1867 the United States entered into a treaty with the Sac and Fox Indians under which it assigned to them a tract of land within the area ceded by Creeks and immediately west of the area retained by them.

"In 1872 one Darling, a surveyor acting for the Government, surveyed the Sac and Fox tract and erroneously extended his lines and closing corners eastward into the unceded Creek lands in disregard of the Bardwell dividing line. Darling's survey was approved by the Commissioner of the General Land Office in 1873; and as a result of this survey and its approval a strip of Creek lands between the Bardwell line and Darling's easterly closing corners, aggregating 5,575.57 acres, was erroneously included within the Sac and Fox tract as officially surveyed and platted, and thereafter was occupied by the Sac and Fox. In 1875 one Hackbusch, a government surveyor, subdivided the sections in the Sac and Fox lands into 40-acre tracts and followed Darling's lines into the unceded Creek lands, thereby perpetuating Darling's error. Hackbusch's survey, like that of Darling, was approved by the Commissioner of the General Land Office.

"By an agreement ratified in the act of February 13, 1891, the Sac and Fox ceded to the United States the tract assigned to them under the Treaty of 1867. In the agreement the United States stipulated it would make allotments in severalty to the Sac and Fox Indians out of lands within their cession; and the ratifying act required that these allotments be made and that the remaining lands be opened to settlement as public lands and sold to settlers at a stated price per acre, which was to be turned into the treasury as public money.

"In carrying that act into effect the Indian and Land Bureaus of the United States erroneously treated the strip of unceded Creek lands between Bardwell's line on the west and Darling's closing corners on the east as part of the Sac and Fox cession, and accordingly allotted and patented part of the strip to Sac and Fox Indians, by way of fulfilling the Government's obligation to them; sold and patented other lands therein to settlers; and turned the purchase price received from such sales into the treasury as public money. These disposals included nearly all of the 5,575.57 acres in the strip, and the grantees have since been holding the same adversely to the Creek Tribe.

"In the court below, as its opinion shows, the parties were agreed that the lands in the strip were unceded Creek lands; and that as to such of them as were disposed of under the Act of 1891, the Creek Tribe is 'entitled to compensation.' But the parties were not agreed respecting the time as of which the value should be ascertained. The tribe contended for the value in 1926, when the suit was brought; while the Government stood for the value at the time of the appropriation, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, *at the time the lands were disposed of under the Act of 1891*" (italics ours).

In deciding when the appropriation took place, this court, in its opinion, states as follows (295 U. S. 103, 111):

> "Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error.
>
> "But not so of the *disposals* under the Act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the Act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. *It was through them that the lands were taken; so the compensation should be based on the value at that time.* * * *" (italics ours).

In following the above directions of this court upon the retrial of this case in the lower court, petitioner, plaintiff below, relied upon a statement of the General Land Office showing disposals of these Creek lands by patents issued to homesteaders from 1893 to 1909, inclusive, supposedly under authority of Section 7 of the Act of February 13, 1891, Ch. 165, 26 Stat. 749, 759; and other disposals of said lands to the State of Oklahoma under the Act of June 16, 1906, Sec. 7, Ch. 3335, 34 Stat. 267, 272. Evidence of values of said lands as of the dates of these disposals was also submitted showing the average values of said lands during this time.

However, upon the retrial of this case in the Court of Claims, the Government resisted our claim for the value of these Creek lands at the time of the disposals or patents, and advanced two entirely new theories, which were not presented to this court when this case was first heard by it. The Government contended that the values should be assessed (1) as of the date of the approval of the Act of February 13, 1891, or if this contention be not correct, then (2) as of the dates upon which homestead entries were made upon the lands (Rec. 30).

The lower court failed to follow the directions of this court that the values should be fixed *at the time of disposals,* and accepted one of the new theories advanced by the United States, that the values should be assessed as of the date of approval of the Act of February 13, 1891 (Rec. 30-31).

Because of the failure of the lower court to follow the plain directions of this court in determining the values, it is respectfully submitted that said court erred as enumerated below.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred:

1. In holding as its conclusion of law that under the decision of this court the date of the approval of the Act of February 13, 1891, is the date as of which values attach to the Creek lands, which this court held were "appropriated" by the erroneous *disposals* of said lands under said Act of 1891.

2. In holding that the values are to be determined *before* the *"appropriation,"* which this court held was at the time of the *disposals* under said Act of February 13, 1891.

3. In holding that the phrase "at that time" as used in the paragraph of this court's decision in dispute (hereinafter discussed), referred to the date of the approval of said Act of February 13, 1891, rather than the time of the *disposals* under said act.

4. In holding that if the Act of 1891, had distinctly directed the disposals, the just compensation should be assessed as of the date of the approval of said act, rather than the times when patents were issued to settlers under the homestead laws, as directed by said act.

5. In not holding that the values attached as of the dates of the disposals under said Act of February 13, 1891.

SUMMARY OF ARGUMENT.

The Creek Nation contends that this court fixed the time of the "appropriation" of these Creek lands *"at the time the lands were disposed of under the Act of 1891"—i. e.,* when erroneous patents to homesteaders were issued through an erroneous application of said Act of 1891 to Creek lands, which patents were subsequently confirmed by the United States by its failure to bring suits to cancel them, thus permitting them to stand as absolute, final and complete aliena-

tions of these Creek lands (295 U. S. 103, 110-111). In making this contention we have merely followed the position of the Government taken before this court when this case was first before it, and which was adopted by this court in its opinion of April 29, 1935.

In our argument we will discuss briefly the following points which we believe the lower court overlooked in deciding that the values attach as of the date of approval of the Act of 1891.

1. The Government's two propositions as to the taking which were before this court upon the review of this case.

2. The theory of this court's decision.

3. "Disposals" as used by this court means "patents."

4. Time of "taking" as determined by this court.

5. Decisions cited by this court in its opinion.

6. The phrase, "at that time."

ARGUMENT.

After reviewing the facts, this court, in its opinion of April 29, 1935, discusses the three points then presented:

> 1. Whether the claim is one that may be presented under the terms of the special jurisdictional act;
>
> 2. Whether there was an appropriation of these Creek lands by the United States; and
>
> 3. When the appropriation took place.

Points 1 and 2 were decided in the affirmative. Under Point 3 the Government advanced two contentions, and upon a review of them it will become evident that the theories advanced by the Government upon the retrial of this case are entirely new ones.

The Government's Two Propositions As to the Taking Which Were Before This Court upon the Review of This Case.

This court had two propositions of the Government before it upon the review of this case, and outlined them in its opinion of April 29, 1935, as follows (295 U. S. 103, 107-108):

> "* * * the Government stood for the value at the time of the appropriation, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, *at the time the lands were disposed of under the Act of 1891*" (italics ours).

In deciding when the appropriation took place, this court rejected the first theory of the Government, but accepted the second theory that the values of these Creek lands should be assessed "at the time of the *appropriation*"—"*at the time the lands were disposed of under the Act of 1891.*"

In refusing to adopt the first theory of the Government, this court said (295 U. S. 103, 111):

> "Plainly the *appropriation* was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error" (italics ours).

And in adopting the second theory of the Government, this court, in the next paragraph, said (295 U. S. 103, 111):

> "*But not so of the disposals under the Act of 1891. They* were intended from *their* inception to effect a change of ownership and were *consummated by the issue of patents,* the most accredited type of conveyance known to our law. True, *they* rested on an erroneous application of the Act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the *disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time.* * * *" (italics ours).

Let us emphasize that these were the only two propositions raised by the Government before this court

—the first being rejected, and the second being adopted. The Government did not at any time contend before this court that the appropriation was as of the date of approval of the Act of 1891, and that values attach as of that date. Surely this court could have adopted a third theory, but it is respectfully submitted that, by the use of the above-quoted language, it did not do so; it simply rejected one proposition of the Government and adopted the other—that the appropriation of these Creek lands was "at the time the lands were disposed of under the Act of 1891," and held in the above-quoted paragraph that the compensation should be based on the value at the time of the consummated disposals—at the time the patents were issued under the Act of 1891.

On the retrial of this case in the Court of Claims, we were surprised to find that the Government had abandoned the theory it had successfully urged before this court, and advanced two entirely new ones.

The lower court's opinion of November 9, 1936 states the positions of the parties as follows (Rec. 30):

> "The case is now before us on the order of remand, and we find the parties in disagreement as to the holding of the Supreme Court in respect to the date or dates on which the value of the lands taken should be ascertained. The defendant contends that under the ruling of the Supreme Court these values should be ascertained (1) as of February 13, 1891, the date of the approval of the Act of Congress under the erroneous application of which the lands were disposed of, or (2) that if this contention be not right then as of the dates upon which homestead entries were made upon the lands.

> The plaintiff, on the other hand, contends that the value of the lands should be ascertained as of the dates on which the Government issued patents therefor during the years 1893 to 1909, inclusive, and has submitted evidence showing the average value of the lands as of those dates."*

The lower court accepted one of the *new* theories advanced by the Government, and assessed the value of these Creek lands as of the date of approval of the Act of 1891.

It is respectfully submitted that such an interpretation of the language of this court in the above-quoted paragraph is inconsistent with its opinion, in that it overlooks the position taken by the Government before this court that it "stood for the value at the time of the *appropriation * * * at the time the lands were disposed of under the Act of 1891,*" which position this court adopted in its opinion of April 29, 1935.

The Theory of This Court's Decision.

The principle enunciated by this court in supporting the Government's second contention was that the confirmation of the erroneous patents issued to these Creek lands under the Act of 1891, created an "implied" promise to pay for them, as for a taking under the power of eminent domain, requiring just compensation to be

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*The lower court rejected the new contention of the Government that the values should be ascertained as of the dates upon which homestead entries were made upon the lands. As respondent states in its brief opposing the petition (p. 5):

> "But these were not acts of appropriation. They were acts of private parties—homesteaders or settlers—not acts of the United States."

made to the Creek Nation under the Fifth Amendment to the Constitution. This court said (295 U. S. 103, 111):

> "Such was the situation when the lands in question *were disposed of under* the Act of 1891. The *disposals* were made on behalf of the United States by officers to whom it had committed the administration of that act, and were *consummated by the issue of patents signed by the President.*
>
> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the *disposals;* but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the *disposals* had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the *disposals* to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect *confirmed the disposals;* and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.
>
> "We conclude that the lands were *appropriated* by the United States in circumstances which involved an *implied undertaking* by it to make just compensation to the tribe" (italics ours).

It is submitted that the holding of the lower court overlooks the theory upon which this court decided this case—that the "taking" of these Creek lands was *implied* through the erroneous issuance of patents to homesteaders under the Act of 1891, and the subsequent confirmation of the patents through the failure of the Government to

file suits to cancel them; that when confirmed these patents were to be considered valid as of the dates of their inception, or issuance, and that the compensation for said lands is to be determined as of said dates.

In the above discussion by this court the date of approval of the Act of 1891 is not the subject matter; but this court discusses almost entirely the *disposals* under the Act of 1891, and the effect of them.

It is submitted that the mere passage of the Act of 1891, directing the disposals of certain Sac and Fox lands and prescribing specific directions to administrative officers to be followed in making said disposals, would not constitute a "taking" of Creek lands as of the date of approval of that act. The Act of 1891 and the proclamation of the President opening the Sac and Fox lands to settlement were general acts of the Government dealing with Sac and Fox lands only, and had no reference to these Creek lands. The "disposals" of Creek lands did not come into existence with the mere approval of the Act of 1891, but had their *inception* in the subsequent erroneous action of the administrative officers of the Government in applying that act to these Creek lands. When patents were issued by the administrative officers of the Government, thus giving these Creek lands to settlers under an erroneous application of the Act of 1891 as to them, then and not until then were these lands affected. As this court said (295 U. S. 103, 110):

> "The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consum-

mated by the issue of patents signed by the President."

This court clearly held that it was what was subsequently done by the administrative officers of the Government—the erroneous application of the Act of 1891 to Creek lands by the erroneous issue of *patents* to homesteaders thereunder, and the confirmation of them—that constituted the "taking" of these Creek lands.

All of the acts of the administrative officers from which this court implied a "taking" of these Creek lands were done *subsequent to* the passage of the Act of 1891. At the date of the approval of this act, the situation in respect to these Creek lands was unchanged since the erroneous survey in 1873, for in 1891 there was no intimation that Creek lands would be disposed of under this act, as it dealt with Sac and Fox lands only. The situation was altered for the first time when the disposals of these Creek lands were made, which was subsequent to the date of approval of the Act of 1891. After passing over the date of approval of the Act of 1891 to the time of the "*disposals*" under this act in order to fix the time of "taking," this court states, "Such was the situation when the lands in question were disposed of under the Act of 1891" (295 U. S. 103, 110).

The lower court states that "If the Act of 1891 had directed the 'disposals,' the 'taking' undoubtedly would have been as of the date of the Act" (Rec. 30). Had the Act of February 13, 1891, expressly directed that the values be determined as of the date of approval of that act, the lower court's view would be correct, and this

court would have clearly so held. Had this been true, however, this court would not have had to *imply* a "taking" of these Creek lands from the unauthorized acts of the administrative officers in issuing the erroneous patents, and the subsequent confirmation of them occurring subsequent to the date of approval of the Act of 1891.

Even if the Act of 1891 had distinctly directed the disposals of these Creek lands, and this court states that the situation here was as if that were so, yet we believe this court held that the values should be assessed as of the dates of *"disposals."* If the Act of 1891 were to be considered as an eminent domain statute authorizing the taking of these Creek lands, the situation would be similar to that in which the "taking" is effected by administrative action under a statute directing such taking and prescribing the rules to be followed, leaving the compensation to be ascertained subsequently by judicial proceedings. In such cases the damages are assessed as of the date of the "taking." As was stated in Nichols on Eminent Domain (2nd Ed.), pp. 1147-1148:

> "* * * When the taking is complete and the right to damages accrues upon the filing of an administrative order, damages are assessed as of the date of such filing. * * *
>
> "One of the reasons assigned for the rule that damages should be assessed as of the date of the formal order of taking was that the alienation of the owner's property was 'definite, complete, and perpetual' on that day, and it would seem to follow that if any further act of the condemning party, such as the filing of a bond, or entry upon the property, is made necessary by statute to make the taking complete and irrevocable, damages

should be assessed as of the date of such further act."

As this court said in *Bauman* v. *Ross*, 167 U. S. 548, 598:

> "Under the Constitution, and by the express provision of Section 18 of this Act, the United States are not entitled to possession of the land until the damages have been assessed and actually paid. The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The Constitution does not require the damages to be actually paid at any earlier time. * * *"

In applying the above rule to this case, we observe that Section 7 of the Act of 1891 (26 Stat. 749, 759) provides the directions to be followed by the administrative officers of the Government in "appropriating" lands under that Act. This section provides as follows:

> "That whenever any of the lands acquired by the agreements in this act ratified and confirmed, shall by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of to actual settlers, only, under the provisions of the homestead laws, except section twenty-three hundred and one, which shall not apply: Provided, however, that each settler, under and in accordance with the provisions of said homestead laws, shall, before receiving a patent for his homestead, pay to the United States for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty-five cents for each acre thereof * * *."

Therefore, the "taking" of Creek lands was consummated under the Act of 1891, when the United

States attempted to pass the title by the issuance of fee patents to settlers under the homestead laws. When this was done, even though erroneously, the title vested in the homesteader, for it was held in 9 L. D. 597, 598, that:

> "When patent has issued for land, although 'a void instrument issued without authority, it *prima facie* passes the title,' and 'precludes the further exercise of departmental jurisdiction over the land until such patent is vacated by judicial action.' John P. S. Voght, 9 L. D. 114, and cases therein cited."

Had the Act of 1891, distinctly directed the disposals, these were the directions to be followed—that the lands be patented to homesteaders. If no patents had been issued to these Creek lands, there could have been no *disposals* of them under the Act of 1891. We believe this court had these directions in mind when it stated that the disposals "were consummated by the issue of *patents* signed by the President" (*supra,* p. 110).

Looking at the situation prospectively from the date of the approval of the Act of 1891, it could not be said that these Creek lands were actually *disposed of* until the patents were issued, for this is when these lands were finally and completely transferred to homesteaders under Section 7 of the Act of 1891. All other action before this time had no reference to Creek lands, but referred generally to Sac and Fox lands only. Looking at the situation in retrospect from the date of the confirmation of the disposals, we are forced, by relation back, to stop at the

dates of the patents, for this marked the final and only definite step taken by the United States affecting these Creek lands; and only when the United States failed to file suits to cancel these erroneous patents, thus permitting them to stand, could it be said that there was a confirmation of said patents. Nothing behind the date of patent could be considered as a "disposal," for no final action was taken prior to the issuance of patent—the act of the Government in disposing of these Creek lands.

Of course, the Government can give its own lands away, or otherwise regulate the price to be paid for them, but Congress cannot direct or limit the "just compensation" to be paid the Creek Nation for these Creek lands. In *Seaboard Air Line Railway Co.* v. *United States*, 261 U. S. 299, 304, this court said:

> "* * * Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 317."

Therefore, it is respectfully submitted that the holding of the lower court—that values attach as of the date of the approval of the Act of 1891—is inconsistent with this court's opinion in that it assesses the value at a time *before* the actual "taking" of these Creek lands, which this court held was at the time of the consummated disposals or patents issued to homesteaders under the Act of 1891.

"Disposals" As Used by This Court Means "Patents."

This court uses the word "disposals" in referring to the acts constituting the "taking," and we believe that in the use of "disposals" the court meant patents issued to homesteaders, for, not until patents were issued to these Creek lands, could there be "disposals" of them under the Act of 1891 within the accepted meaning of this term.

"To dispose of" means "to get rid of; to put out of the way; to finish with; * * * to transfer to the control of some one else, as by selling; to alienate; to part with; to relinquish; to bargain away" (Webster's New International Dictionary).

Words and Phrases (2 Ser.), Vol. 2, sets forth the legal construction of the term "disposals" as follows:

> "To 'dispose of' means to part with, to relinquish, to get rid of, to alienate, to effectually transfer. *Connely* v. *Putnam*, 111 S. W. 164, 166, 51 Tex. Civ. App. 233." See other definitions to the same effect in *Whitfield* v. *Thompson*, (Miss.) 38 So. 113, 117; *Newcomb* v. *Newcomb*, 12 N. Y. 603, 620; *Ironside* v. *Ironside*, 130 N. W. 414, 416, 150 Iowa 628.

Therefore, under the accepted definition of the term "disposals," these Creek lands could not be said to have been "disposed of" until patents were issued to homesteaders under the homestead laws, as directed in Section 7 of the Act of 1891.

Having this definition of "disposals" in mind, this court gives us the meaning and the sense in which the word was used in its opinion as follows (295 U. S. 103, 107):

> "In carrying that Act (February 13, 1891) into effect the Indian and Land Bureaus of the United States erroneously treated the strip of unceded Creek lands between Bardwell's line on the west and Darling's closing corners on the east as part of the Sac and Fox cession, and accordingly *allotted and patented* part of the strip to Sac and Fox Indians, by way of fulfilling the Government's obligation to them; *sold and patented* other lands therein to settlers; and turned the purchase price received from such sales into the treasury as public money. *These disposals* included nearly all of the 5,575.57 acres in the strip, and grantees have since been holding the same adversely to the Creek tribe" (italics ours).

Thus, this court has given us the meaning to be applied to the word "disposals" in this case, and has limited its meaning to the lands either "allotted" or "patented." It is obvious, too, that this court would not have used the word "grantees" in connection with the word "disposals," unless the word had reference to allottees and patentees, for the word "grantees" implies a transfer of title by deed or patent.

This court further states (295 U. S. 103, 110) that:

> "Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose,"

and the case of *United States* v. *Minnesota*, 270 U. S. 181, 194-196, is cited in support of this principle. A reference to this case shows that the lands therein involved were *patented* to the State of Minnesota. This is another instance in the opinion wherein this court uses the word "disposals" as meaning patents.

Clearly the United States would not have had to bring suits to *cancel* "disposals" unless "disposals" meant "patents" issued. It is well known to the court that under the homestead laws public lands are under the supervision of the Interior Department up to the time of the issuance of patent. However, as soon as a patent is issued, the land is immediately released from the supervision of the department, and the patent can be disturbed only by judicial proceedings (see *supra*, p. 18).

Surely, this court did not use the word "disposals" in any other sense than as meaning the issuance of patents, when it was well known to it that no suit would be necessary to cancel a homestead entry, or any action of the administrative officers prior to the issuance of patent, it being within the power of the department to annul such preliminary action without judicial proceedings.

Therefore, it is obvious, from the language of its decision, that this court meant by the use of the word "disposals" either "deeds" to allottees or "patents" to homesteaders, and that the "taking" was "consummated" by the issuance of patents to the lands involved.

Time of Taking As Determined by This Court.

The lower court seems to agree with our contention that this court fixed the "taking" "at the time of the disposals under the Act of 1891." In its decision of November 9, 1936, the lower court states as follows (Rec. 30):

> "The court characterizes the 'taking' of plaintiff's lands as 'disposals' of them. These 'disposals'

were 'consummated by the issue of patents signed by the President.'"

However, the lower court failed to award the compensation as of the dates of the "takings," which were completed by the patents issued to these Creek lands under the directions set forth in Section 7 of the Act of 1891, but went behind the "takings" to fix the values as of the date of approval of the Act of 1891. We believe that the lower court failed to follow the plain language of this court when it said (295 U. S. 103, 111):

> "It was through them (the disposals) that the lands were taken; so the compensation should be based upon the value at that time."

Our contention is further borne out by the statement of this court in the paragraph following the above sentence (295 U. S. 103, 111):

> "But the just compensation to be awarded now should not be confined to the *value of the lands at the time of the taking* but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking" (italics ours).

We believe that the syllabus, in this instance, clearly sets forth the substance of this court's opinion as follows (295 U. S. 103, 104):

> "(3) The taking was accomplished, not by the erroneous survey (1873), but by the disposals under the Act of 1891 (p. 111).
>
> "(5) Compensation should be based, not on the value of the lands at the time of the erroneous survey nor at the time of bringing the suit; but on the

value at the time of the disposals, with reasonable interest added, as a measure, to make up the full equivalent of the value paid contemporaneously with the taking" (p. 111).

In no part of its opinion did this court state that the "taking" was as of the date of approval of the Act of 1891, and that compensation should be fixed as of that date. Therefore, it is submitted that the plain language of the opinion of this court directs that the value of these Creeks lands is to be assessed at the time of the "taking," with interest from that date to the date of judgment. This is the general rule in these eminent domain cases, and we believe that this court followed that rule.

Decisions Cited by This Court in Its Opinion.

That this court followed the general rule as to the assessment of just compensation in eminent domain cases, is clearly evident from a review of the decisions of this court cited at page 111 of 295 U. S., viz.: *United States* v. *Lynah,* 188 U. S. 445, 465, 471-472; *United States* v. *North American Company,* 253 U. S. 330, 333-334; *Phelps* v. *United States,* 274 U. S. 341, 343-344; *United States* v. *Rogers,* 255 U. S. 163, 169; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304-306. All of these decisions were before this court and influenced its decision in this Creek case, and we believe that this court followed the holdings in these cases as to the assessment of just compensation. In all of these cases the holdings are consistent in that the just compensation was not awarded as of the date of the

approval of the act of Congress under which the lands were appropriated, but was awarded as of the date of appropriation, or as of the date of the approval of the appropriation by the administrative officer who was authorized to do so under the act of Congress. If this principle is applied to the Creek case before us, the just compensation should have been awarded as of the dates of the issuance of patents to these Creek lands under the Act of 1891.

The Phrase, "At That Time."

The lower court interprets the phrase, "at that time," as used in the paragraph in this court's opinion now in dispute, as referring to the date of approval of the Act of February 13, 1891. This paragraph reads as follows (295 U. S. 103, 111):

> "But not so of the *disposals* under the Act of 1891. *They* were intended from *their* inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, *they* rested on an erroneous application of the Act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the *disposals*. It was through *them* that the lands were taken; so the compensation should be based on the value *at that time*, and not, as ruled below, on the value when the suit was begun" (italics ours).

In interpreting the phrase, "at that time," as used by this court in the above-quoted paragraph, the lower court states as follows (Rec. 30):

> "The words 'at that time' clearly refer to the Act of 1891 under the erroneous application of which 'disposals' of plaintiff's lands were made. If the Act of 1891 had directed the 'disposals,' the 'taking,' undoubtedly would have been as of the date of the act, and since the court holds that the matter stands as if the act had distinctly directed the 'disposals,' there can be no doubt that plaintiff's compensation for the lands taken must, under the court's decision, be based on the value of the lands as of the date of the approval of that act, February 13, 1891, * * *."

In so construing this phrase, the lower court comments upon the language used in two sentences of the above-quoted paragraph of this court's opinion.

The first sentence commented upon is as follows:

> "True, they (the disposals) rested on an erroneous application of the Act of 1891, to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals."

The second sentence contains the phrase "at that time," and is as follows:

> "It was through them (the disposals) that the lands were taken; so the compensation should be based on the value at that time."

In each of these sentences this court was discussing the disposals, and not the date of approval of the Act of 1891, and in its holding we believe that the lower court loses sight of the fact that "disposals" is the subject matter under discussion by this court in the above-quoted paragraph.

A careful analysis of the grammatical structure of this paragraph does not support the conclusion reached by the lower court. In the above paragraph this court was discussing "the *disposals* under the Act of 1891," and not the date of approval of the Act of 1891. The topic sentence of this paragraph is "But not so of the *disposals* under the Act of 1891." "Under the Act of 1891" is a prepositional phrase subordinate to "the disposals." The Act of 1891 is incidentally brought into the discussion of the main topic "the disposals." The effect of the *disposals* is discussed all through the paragraph, and in the discussion "disposals" are referred to as "they," "their," and "them." The most important part of the discussion is found in the last sentence of this paragraph, which reads, "It was through them that the lands were taken; so the compensation should be based on the value *at that time* * * *." In this sentence the Act of 1891 is not mentioned, but the "disposals" are specifically referred to as "them," the antecedent of the word "them" being "disposals." "It" is the grammatical subject of the sentence, and refers to "that the lands were taken," which is the real subject;* and the phrase "through them" refers to "disposals," the subject matter of this whole discussion. We believe that the meaning of this court, as expressed in this sentence, is as follows:

> "The lands were taken through the disposals; so the compensation should be based on the value at that time—the time of the disposals."

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*See Advanced English Grammar by Kittredge and Farley, Section 391, page 161, wherein it is stated that:

> "Noun clauses with **that** are common in the predicate when the expletive **it** is the grammatical subject * * *. In such sentence the real subject of the thought is the clause."

Therefore, it is respectfully submitted that "at that time" referred to the time of the *disposals* under the Act of 1891. As these disposals were directed by the Act of 1891 to be made to various persons under the homestead laws and at various times, "at that time" would refer to the time of each of these disposals, for when each patent was issued a separate and distinct portion of Creek land was disposed of under this act. We believe that this court, by using the singular phrase "at that time," referred to the time of disposals collectively and generally, and not to the date of approval of the Act of 1891.

It is submitted that, if this court had meant to hold that the date of approval of the Act of 1891 was the time of the "taking," there would have been no need for it to discuss at length the effect of the "disposals" under that act in the above-quoted paragraph. To interpret the phrase "at that time" to mean the time of the *disposals* under the Act of 1891, would have the effect of bringing this phrase into harmony with the context of the sentence and paragraph in which it occurs.

Plainly, by the use of the above language of this paragraph, this court simply adopted the second contention of the Government as to the appropriation of these Creek lands, and decided the issue in the light of that contention. In the last sentence of the paragraph this court said (295 U. S. 103, 111):

> "It was through them (the disposals) that the lands were taken; so the compensation should be based on the value *at that time*"—*i. e.*, the time of

the disposals, or, as is stated in the Government's own contention, *"at the time the lands were disposed of under the Act of 1891"* (italics ours).

The phrase "at the time" in the Government's contention then before this court referred specifically to the *disposals* under the Act of 1891, and not to the date of approval of the Act of 1891. Therefore, in the use of the phrase "at that time" by this court, in a discussion the subject matter of which was *disposals*, it is most evident that this phrase could relate only to the time of the disposals, as similarly used in the Government's own contention. This is the heart of the whole controversy, and we desire merely to ask the court to hold the Government to this contention, which it heretofore successfully urged before this court.

Conclusion.

Therefore, it seems evident that this court held that the "appropriation" of these Creek lands was *"at the time* of the *disposals"* or patents, and that the values attach *"at that time."*

Respectfully submitted,

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